DrinkerBiddle

Employee Benefits &
Executive Compensation Alert
October 2009

Wellness Programs Require a Thorough Check-Up

Many employers have established wellness programs (*i.e.*, health risk assessments including questionnaires and basic screenings, disease management programs and other programs) to promote healthy behavior and disease prevention. Many wellness programs are designed with incentives for employees to participate, paid in various forms, such as premium discounts, lower annual deductibles and cash. Some employers even require employees to complete a health risk assessment to be covered under the group medical plan or under certain plan options.

Three primary federal laws impact wellness programs – the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Genetic Information Nondiscrimination Act of 2008 (GINA) and the Americans with Disabilities Act of 1990, as amended (ADA). In light of recent regulatory action under GINA and informal guidance from the Equal Employment Opportunity Commission (EEOC) under the ADA, this is an excellent time for employers to review their wellness programs for compliance with the new rules under GINA, as well as under the ADA and HIPAA, particularly if the wellness program includes a financial incentive or some other type of reward for employees who participate.

Genetic Information Nondiscrimination Act of 2008 (GINA)

While GINA includes provisions applicable to group health plans and health insurance issuers (Title I), as well as employers (Title II), this Alert focuses on the relevant rules under Title I.

Title I of GINA applies to group health plans sponsored by private employers, unions, and state and local government employers. Church plans also are covered. On October 7, 2009, the United States Departments of the Treasury, Labor and Health and Human Services issued interim final regulations under GINA addressing the prohibition under Title I against group health plans and issuers in the group market requesting, requiring or buying genetic information for underwriting purposes, or prior to or in connection with enrollment.

Under Title I, group health plans and insurers are prohibited from:

- restricting enrollment, or adjusting premium or contribution amounts for the group on the basis of genetic information;
- requesting or requiring that individuals undergo a genetic test (subject to limited exceptions); and
- requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.

Under GINA, "genetic information" includes information about an individual's genetic tests or the genetic test of family members, family medical history or any request of or receipt by an individual or family members of genetic services, which includes genetic tests, genetic counseling and genetic education.

Underwriting Purposes. The prohibition on collecting genetic information at any time for underwriting purposes impacts wellness programs. The regulations provide that "underwriting purposes" include rules for and determinations of eligibility (including enrollment and continued eligibility), computation of premium or contribution amounts, and application of preexisting condition exclusions. Notably, the rules clarify that "underwriting purposes" includes changing deductibles or other cost-sharing mechanisms, or providing discounts, rebates, payments in kind or other premium differential mechanisms in return for activities such as completing a health risk assessment (HRA) or participating in a wellness program.

The recently issued regulations under Title I prohibit plans from requesting, requiring or buying genetic information (such as family history) in connection with an HRA that provides individuals an incentive for completing the HRA. In essence, under the new rules, plan sponsors now have three options for using HRAs:

1. Implement an HRA that does not solicit genetic information, so that the employer may provide an incentive to participants for completing the HRA, if desired;
2. Implement an HRA that solicits genetic information, but do not: (a) provide an incentive for taking the HRA, or (b) make the request prior to or in connection with enrollment; or
3. Implement a variation on the programs described above by administering two HRAs – one that does not solicit genetic information, for the completion of which an employee may earn a reward, and one that solicits genetic information. The regulations approve this design, provided that the HRA that solicits genetic information is wholly voluntary, and a participant's completion of or failure to complete it will not affect the reward for the completion of the other HRA.

Prior to or in Connection with Enrollment. A wellness program is similarly prohibited from collecting genetic information prior to or in connection with enrollment in a group health plan. The collection of information is considered to be prior to enrollment if it is before the individual's effective date of coverage under the plan. This determination is made at the time of collection. In the case of a plan that requires individuals to reenroll or permits individuals to change their elections annually, genetic information collected after a current enrollment is not considered made prior to a subsequent enrollment unless the collection is or will be used to affect the subsequent enrollment.

Incidental Collection Exception. If a health plan obtains genetic information incidental to the collection of other information, the collection does not violate GINA as long as the collection is not for underwriting purposes. This exception does not apply, however, if it is reasonable to anticipate that health information will be received, unless the collection explicitly states that genetic information should not be provided. Consider an HRA that includes a catch-all question such as "Is there anything else relevant to your health that you would like us to know or discuss with you?" Even if such an HRA does not directly ask for genetic information or family medical history, it will fall outside the incidental collection exception if it fails to also indicate that genetic information should not be provided. Employers should change all wellness initiative-related requests to state that "genetic information should not be provided."

Determining Medical Appropriateness. The rules indicate that genetic information contained in an HRA may not be used to determine whether an individual qualifies for a disease management program because the disease management program is an incentive to participate in the HRA. A disease management program may be structured to limit benefits based on medical appropriateness, however. If an individual seeks to participate in a disease management program, and the plan limits the benefit to only those individuals for whom it is medically appropriate and the determination of medical appropriateness depends on genetic information, the program may condition the benefit on receipt of the minimum necessary genetic information. In application, this rule will only apply in the case of a disease management program that covers not just employees with diseases, but also those employees who are at risk for a disease that has not yet manifested.

2009 Wellness Offerings. Some group health plans may currently be administering HRAs with related incentives in connection with open enrollment for 2010. If such an HRA collects genetic information, based on GINA's effective date, it appears that a related incentive may still be paid for this year if it is paid before the effective date of GINA for that group health plan (*i.e.*, before January 1, 2010, for calendar year plans). Of course, any wellness programs that collect genetic information and include incentives for participation will have to be redesigned for use during the upcoming plan year.

If an employer's wellness program has components completed in both 2009 and 2010 (*e.g.*, an HRA with family medical history completed in 2009 results in premium reduction in 2010), the implications under GINA should be reviewed as modifications are likely needed.

Effective Date. GINA is effective for plan years beginning after May 21, 2009 (January 1, 2010, for calendar year plans) and the regulations under Title I of GINA are effective for plan years beginning on or after December 6, 2009 (also January 1, 2010, for calendar year plans).

Americans with Disabilities Act (ADA)

Title I of the ADA limits when an employer may obtain medical information from applicants and employees. Once employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. With regard to wellness programs, under the ADA an employer may seek medical information for voluntary wellness programs as long as the information is maintained in separate, confidential (with some exceptions) medical

files and the information is not used for purposes inconsistent with the ADA. The EEOC takes the position that a wellness program is "voluntary" if an employer neither requires participation nor penalizes employees who do not participate. Recently, the EEOC issued two informal discussion letters that conclude that participation in a health risk assessment is not "voluntary" if an employee must complete the assessment in order to obtain health insurance or receive an employer contribution under a health reimbursement arrangement. One such letter also rescinded the portions of an earlier discussion letter that indicated the EEOC approved of an incentive as long as the inducement to participate in the program did not exceed 20 percent of the cost of employee-only or family coverage, consistent with the HIPAA regulations that address wellness programs. This rescission may signify a change in the EEOC's approach to incentives under wellness programs. The other letter describes some of the "disability-related inquiries" that do not appear to be job-related and consistent with business necessity, and are commonly found in HRAs, including "questions about how often they feel depressed; whether they ever have been told that they have certain conditions, such as asthma, cancer, heart disease, or diabetes; how many different prescription medications they currently take; or how much alcohol they drink." The second letter also highlights the questions that are not disability-related and not subject to the ADA's restrictions, including "questions about 'Self Care,' such as whether an employee sees a personal doctor for routine care or has a health care directive, questions about 'Health Choices,' such as how many servings of vegetables or fruit an employee eats, whether he takes a vitamin supplement, or eats breakfast, and questions about 'Health Choices,' such as how much an employee exercises."

EEOC guidance and discussion letters issued to date are informal and not binding on courts, but are good indicators of how the EEOC would approach this issue. Whether courts would agree with the EEOC's position is an open question. Based on this informal guidance, if an employee refuses to participate in an HRA and, as a result, does not have access to the incentive offered in connection with the HRA, the EEOC may take the position that the incentive is actually a "penalty" for those employees who do not participate in the HRA.

Health Insurance Portability and Accountability Act (HIPAA)

The nondiscrimination rules under HIPAA have been in effect for some time and many employers have established wellness programs to satisfy these requirements – requirements that for many years (prior to the recent developments under ADA and GINA) were thought to be the primary obstacle to providing an incentive to employees for their participation in wellness programs.

Under HIPAA a group health plan may not discriminate among similarly situated individuals based on a health status-related factor, including medical condition, claims experience, receipt of health care, medical history, genetic information or disability. A plan is prohibited from discriminating in rules for eligibility, benefits offered and cost to the participant. For example, plans may not charge individuals a higher premium because they are smokers. Under HIPAA, however, there are two ways that rewards may be offered to those who participate in a wellness program: (1) the program is available to all similarly situated individuals and does not condition eligibility for the reward based on a participant's ability to meet a certain health standard ("participation-only" programs); or

(2) the program satisfies the requirements described below ("standard-based" programs). Examples of participation-only programs are reimbursements for participation in a smoking-cessation program (regardless of outcome) and a program that rewards employees for attending a monthly health education seminar. The requirements for a standard-based program are as follows:

1. The total reward must not exceed 20 percent of the cost of coverage (employee and employer portions). "Rewards" include premium discounts/rebates, waiver of all or part of a cost-sharing mechanism (*e.g.*, deductible, co-pay, coinsurance), the absence of a surcharge and the value of a benefit that would otherwise not be provided;
2. The program must be reasonably designed to promote health or prevent disease;
3. The program must provide participants the opportunity to qualify at least once per year (could be more frequent, such as quarterly);
4. A reward must be available to all similarly situated individuals. If it is unreasonably difficult due to a medical condition or medically inadvisable for a participant to satisfy the otherwise applicable standard, the program must provide the individual with a reasonable alternative standard (or a waiver). The program may require that the participant verify the existence of a prohibitive medical condition (*e.g.*, physician statement); and
5. The plan's materials describing the reward must disclose the terms of the wellness program, including that alternative standards (or a waiver) are available.

Action Steps

- As the most time-sensitive matter, assess wellness programs to determine which collect genetic information (including family medical history). Redesign wellness programs to eliminate requests for genetic information and family medical history or to eliminate any related incentives. Alternatively, design two HRAs – one that provides an incentive to participate, but does not collect any genetic information and the other that solicits genetic information, is wholly voluntary and includes no incentive for participation.
- Review communications describing wellness-program-related requests to determine whether language is needed to protect the incidental collection exception under the GINA rules.
- Keep an eye on developments in the EEOC's position on wellness incentives. In light of the EEOC's recent letter withdrawing the guidance indicating that a 20 percent incentive was within the EEOC definition of a "voluntary" wellness program, incentivizing employees to participate in wellness initiatives could expose an employer to an increased risk of litigation under the ADA (*e.g.*, a claim that someone was penalized based on the requirement to participate in the wellness program).
- Review any standard-based programs for compliance with the wellness program exception to the HIPAA nondiscrimination rule.

Employee Benefits & Executive Compensation Practice Group

If you have any questions about, or would like assistance ensuring compliance with, the rules related to wellness programs, please contact any member of our Employee Benefits & Executive Compensation Practice Group listed below.

Kathleen O'Connor Adams
(312) 569-1306
Kathleen.Adams@dbr.com

Gary D. Ammon
(215) 988-2981
Gary.Ammon@dbr.com

Mark M. Brown
(215) 988-2768
Mark.Brown@dbr.com

Barbara A. Cronin
(312) 569-1297
Barbara.Cronin@dbr.com

Mona Ghude
(215) 988-1165
Mona.Ghude@dbr.com

Amy Lynn Graves
(312) 569-1318
Amy.Graves@dbr.com

Megan Glunz Horton
(312) 569-1322
Megan.Horton@dbr.com

Sharon L. Klingelsmith
(215) 988-2661
Sharon.Klingelsmith@dbr.com

Christine M. Kong
(212) 248-3152
Christine.Kong@dbr.com

Kelly S. Kuglitsch
(414) 221-6059
Kelly.Kuglitsch@dbr.com

David Levin
(202) 230-5181
David.Levin@dbr.com

Howard J. Levine
(312) 569-1304
Howard.Levine@dbr.com

Benjamin S. Lupin
(215) 988-2905
Benjamin.Lupin@dbr.com

Joyce L. Meyer
(312) 569-1305
Joyce.Meyer@dbr.com

Sarah Bassler Millar
(312) 569-1295
Sarah.Millar@dbr.com

Joan M. Neri
(973) 549-7393
Joan.Neri@dbr.com

Monica A. Novak
(312) 569-1298
Monica.Novak@dbr.com

Cristin M. Obsitnik
(312) 569-1303
Cristin.Obsitnik@dbr.com

Jean D. Renshaw
(610) 993-2259
Jean.Renshaw@dbr.com

Michael D. Rosenbaum
(312) 569-1308
Michael.Rosenbaum@dbr.com

Dawn E. Sellstrom
(312) 569-1324
Dawn.Sellstrom@dbr.com

Lori L. Shannon
(312) 569-1311
Lori.Shannon@dbr.com

Mark J. Simons
(610) 993-2247
Mark.Simons@dbr.com

Joshua J. Waldbeser
(312) 569-1317
Joshua.Waldbeser@dbr.com

Holly C. Kopack Willobee
(312) 569-1312
Holly.Willobee@dbr.com

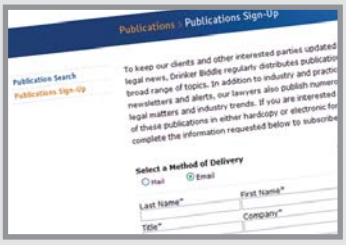
David L. Wolfe
(312) 569-1313
David.Wolfe@dbr.com

Disclaimer Required by IRS Rules of Practice:
Any discussion of tax matters contained herein is not intended or written to be used, and cannot be used, for the purpose of avoiding any penalties that may be imposed under Federal tax laws.

Other Publications

www.drinkerbiddle.com/publications

Sign Up



www.drinkerbiddle.com/publications/signup